

ALEX NANDASERI DE SILVA

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v.

SARATH WICKRAMA SURENDRE

HIGH COURT MALAYA, KUALA LUMPUR

B

SU GEOK YIAM J

[CIVIL SUIT NO: 22-482-2009]

29 MARCH 2013

CIVIL PROCEDURE: *Jurisdiction - Discretion - Whether judge at pre-trial case management could direct party to exclude from producing at trial documentary evidence concerning matters which took place at failed mediation proceedings between parties - Whether such matters privileged and prohibited from disclosure - Practice Direction No. 5 of 2010 and r. 15 of Malaysian Mediation Centre's Mediation Rules - Whether court had discretion to direct exclusion of prima facie inadmissible evidence at case management stage to achieve just, economical and expeditious disposal of case - Rules of Court 2012, O. 34*

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The plaintiff, *inter alia*, claimed for general, aggravated and/or exemplary damages against the defendant for defamation. During case management, the parties indicated that they wished to have their dispute resolved by way of mediation before a judge. Following a 1 1/2 hour mediation session, the plaintiff, at a subsequent case management date, informed the Registrar that the matter had been successfully mediated and that the plaintiff would withdraw the matter upon the defendant publishing a letter of apology. The defendant, however maintained, as he had done in his statement of defence, that there was no question of him apologising for what he had said about the plaintiff in a letter. The defendant said the mediation did not result in him signing any agreement with the plaintiff concerning terms of settlement of their dispute and he applied for the matter to be set down for trial. When the matter came up for final pre-trial case management before the judge, the latter directed the plaintiff to (i) exclude from his bundle of documents copies of three letters ('the three letters') his solicitors had addressed to the defendant's solicitors referring to what had transpired during the mediation proceedings and requiring him to publish an apology letter in the form drafted by the plaintiff; and (ii) exclude from the plaintiff's witness statement all references to whatever had transpired during the mediation proceedings. Aggrieved by these directions, the plaintiff filed a notice of appeal to the Court of Appeal and obtained a stay of the suit pending the outcome of the appeal.

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A Held (outlining reasons for directions given by court):

- B** (1) As the mediation had failed or had not been effectively concluded by the signing of an agreement setting out the terms of settlement, the plaintiff could not rely on the three letters to support his claim for aggravated damages at the trial by using those letters to establish that the mediation was successful and that the defendant was refusing to perform his side of the agreed settlement by not publishing the apology letter in the format drafted by the plaintiff's solicitors. The court was of the view that the three letters were irrelevant and inadmissible in evidence. (paras 76 & 89)
- C**
- D** (2) Since the mediation was aborted, the plaintiff could not rely on his alleged version of what had transpired at the failed mediation to support his claim for aggravated damages at the trial. References to the mediation proceedings were inadmissible just like any other case involving correspondences that were marked 'without prejudice' or other communications to that effect between parties who had attempted to settle a dispute but failed to achieve settlement. (paras 94 & 95)
- E** (3) As communications made by the parties during mediation were confidential (see para. 6.1 of Practice Direction No. 5 of 2010 and r. 15 of the Malaysian Mediation Centre's Mediation Rules), the three letters were privileged documents and were protected from production during the trial of the suit. The three letters were not relevant, within the meaning of s. 5 of the Evidence Act 1950 ('EA'), to the facts in issue and the mediation was not a relevant fact to be proved during the trial because there was no settlement agreement signed by the parties nor a consent judgment recorded in court following the mediation. Section 23 of the EA also expressly protected the three letters from disclosure at the trial as there was some implied agreement between the parties against their production. Not only were the three letters protected from disclosure at the trial, the defendant was also entitled to refuse to answer questions posed to him during the trial concerning what had transpired during the mediation. (paras 144 & 179)
- F**
- G**
- H** (4) Order 34 of the Rules of Court 2012, which provided for case management, conferred wide discretion on the court in the course of managing a case to make decisions and directions to ensure the just, economical and expeditious disposal of a case. To achieve that objective, the court was fully empowered to exclude the filing of documents and witness statements which were clearly inadmissible. (para 124)
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Case(s) referred to:

Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co [1882] 11 QBD 55 (*refd*)

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC (*refd*)

Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd [2005] 2 CLJ 465 CA (*refd*)

Serangoon Garden Estate Ltd v. Ang Keng [1953] 1 LNS 98 HC (*refd*)

Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 (*refd*)

The Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan and Another Case [1993] 4 CLJ 98 HC (*refd*)

Legislation referred to:

Defamation Act 1957, s. 8

Evidence Act 1950, ss. 5, 23

Mediation Act 2012, ss. 2, 3, 15, 16

Rules of Court 2012, O. 34 rr. 2(2)(a), (3)

Rules of the High Court 1980, O. 34 r. 4

Subordinate Courts Rules 1980, O. 19 r. 1(1)(b)

Other source(s) referred to:

Halsbury's Laws of Malaysia, vol 1, pp 405, 406, 435, 436

For the plaintiff - Gopal Sreenevasan (S Ravindran with him); M/s Sreenevasan & Young

For the defendant - R Devadason; M/s Devadason & Devadason

Reported by Ashok Kumar

JUDGMENT**Su Geok Yiam J:****Background**

[1] The plaintiff is an advocate and solicitor of 17 years standing who is currently practicing as a partner at Bodipalar Ponnudurai De Silva.

[2] The defendant is one of the trustees for the venerable Dr K Sri Dhammanananda trust fund ("trust fund") created by the late venerable Dr K Sri Dhammanananda ("settlor"), the former chief monk of the Buddhist Maha Vihara.

[3] The trust fund was created for charitable purposes which included, *inter alia*, the advancement of Buddhism in Malaysia. The settlor was the original trustee of the trust fund.

A The Settlor's Statutory Declaration Dated 12 June 2006

[4] According to the plaintiff, before the settlor's demise on 31 August 2006, the settlor appointed him to draft a statutory declaration to appoint the defendant and seven other persons as the trustees of the trust fund ("board of trustees"). The settlor, subsequently, executed the statutory declaration on 12 June 2006 ("SD").

The Defendant's First Letter Dated 18 March 2009 To The Honorary Secretary Of The Trust Fund

[5] According to the plaintiff, the defendant wrote a letter dated 18 March 2009 (the "first letter") to the honorary secretary of the trust fund (the "honorary secretary") and copied it to the other members of the board of trustees. The first letter which questioned the authenticity of the SD made by the settlor contained offending words which defamed him as it alleged that the plaintiff conspired and engineered the preparation of a false statutory declaration to misappropriate the trust fund amounting to RM2.6 million.

The Defendant's Second Letter Dated 27 April 2009 To The Honorary Secretary Of The Trust Fund

[6] According to the plaintiff, the defendant, *vide* a second letter dated 27 April 2009 (the "second letter"), which was also addressed to the honorary secretary and copied to the other members of the board of trustees, repeated his allegations against the plaintiff.

F The Plaintiff's Writ Of Summons And Statement Of Claim

[7] Hence, on 7 July 2009, the plaintiff filed this suit *vide* a writ of summons, encl. (1), against the defendant. It is founded on defamation, ie, libel, as his cause of action. The relief which he is seeking in para. 13 of his statement of claim, encl. (2), are an injunction to restrain the defendant and/or his agents from causing to be published or further publishing the alleged libel, general damages, aggravated and/or exemplary damages, interest, cost and any other relief deemed suitable by this Honourable Court.

[8] The plaintiff has reproduced the first letter in verbatim in his statement of claim. The plaintiff has pleaded in para. 9 of his statement of claim that the contents of the first letter, in their natural and ordinary meaning or by way of innuendo, insofar as it referred to the plaintiff, meant and were understood to mean that:

(i) the plaintiff is a dishonest lawyer;

- (ii) the plaintiff had committed and is given to committing criminal offences; **A**
- (iii) the plaintiff had conspired with the Trustee(s) to violate the Trust; **B**
- (iv) the plaintiff had conspired with the Trustee(s) to misappropriate the Trust Fund which stands at RM 2.6 million; and **B**
- (v) the plaintiff had conspired and engineered the preparation of a false statutory declaration or the procurement of the execution of a statutory declaration from a person without capacity. **C**

The Defendant's Memorandum Of Appearance

[9] On 31 July 2009, the defendant entered his appearance by filing a memorandum of appearance through his previous solicitors, namely, Messrs Patrick Dass & Co, encl. (3). **D**

The Defendant's Statement Of Defence

[10] On 24 August 2009, the defendant filed his statement of defence ("defence"), encl. (4). **E**

[11] In para. 5 of his defence, the defendant admitted writing the first letter but denied that it was defamatory of the plaintiff. **E**

[12] In para. 6 of his defence, he alleged that he had come to know of certain discrepancies in the SD and he had written the first letter to the honorary secretary in order to ask him to investigate the matter comprehensively, as there was a possibility that the terms of the trust deed have been breached and the possibility that it had resulted in the commission of serious criminal offences. The defendant also alleged that it was his responsibility as a member of the board of trustees to bring the matter to the notice of the honorary secretary. **F**
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[13] In para. 7 of the defence, the defendant alleged that he did not circulate the first letter to the other members of the board of trustees but that it was the honorary secretary who had circulated the first letter to the other members of the board of trustees. **H**

[14] The defendant has relied on the defences of qualified privilege and justification in sending the first letter to the honorary secretary who is the father-in-law of the plaintiff. **I**

- A [15] The defendant has also alleged, *inter alia*, that there was a conflict of interest on the part of the honorary secretary and the plaintiff when the plaintiff was retained to prepare the SD as the relationship between the honorary secretary and the plaintiff was not disclosed to the members of the board of trustees by the plaintiff or the honorary secretary.
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- C [16] Apart from that, at that time, the defendant was the President of the Sasana Abhiwurdhi Wardhana Society (SAWS) and was close to the settlor. Whenever there was any change which needed to be done to the trust fund the defendant would be called to witness the signature of the settlor when the settlor made the amendment to the document concerning the trust fund but the same was not done in the instant case.
- D [17] Furthermore, according to the defendant, the trust deed was drawn up by one Mr M Visvanathan, from Messrs Saibullah MV Nathan & Co, who had been responsible for and who had attended to the registration of the trust fund and the setting up of the trust fund from the very beginning. According to the plaintiff, Mr M Visvanathan, who was a trusted follower of the settlor, had since then been providing his invaluable services to the board of trustees relating to the administration of the trust fund free of charge.
- E
- F [18] Yet out of the blue, shortly after the demise of the settlor, the plaintiff had phoned Mr M Visvanathan and informed him that upon the instructions of the trustees, the plaintiff had taken over the position of legal adviser for the trust fund from Mr M Visvanathan. The plaintiff had also asked him to hand over to the plaintiff all the documents and correspondences concerning the trust fund. However, Mr M Visvanathan, told the plaintiff that he did not receive any official communication concerning the matter and that he regretted that the plaintiff's request could not be entertained.
- G [19] The defendant has alleged that the averment of the plaintiff that he was appointed by the board of trustees as its legal adviser is false and constitutes a serious offence.
- H [20] The defendant also questioned why Mr M Visvanathan was not called upon to prepare the SD for the settlor, why the SD was not signed by the settlor, why the plaintiff prepared the SD and why the plaintiff affixed the thumbprint of the settlor on the SD.
- I [21] The defendant also alleged that, on 29 October 2008, he had met with and spoken to one Mr Tan Kim Chooi, the Commissioner of Oaths, who was attached to the Kuala Lumpur High Court at the

material time, who had purportedly witnessed the affixing of the settlor's thumbprint on the SD, at the material time, and who had affixed his Commissioner of Oaths' stamp on the SD.

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[22] The defendant further alleged that Mr Tan Kim Chooi informed him that the SD was prepared by the plaintiff and that he (Mr Tan Kim Chooi) had affixed his Commissioner of Oaths' stamp on the SD at the Buddhist Maha Vihara and not at the Kuala Lumpur High Court, contrary to what appeared to have occurred based on the contents of the SD, upon the request of the plaintiff and the most venerable Dhammaratana Nayake Thera, the present chief monk of the Buddhist Maha Vihara.

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[23] It was at the first meeting of the trustees which was held on 8 November 2006, that unexpectedly, the most venerable K Dhammaratana Nayake Thera had produced the SD which had the thumbprint of the settlor and the SD mandated the admission of two additional members as trustees of the trust fund.

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[24] The defendant had been working closely with the settlor from the beginning of the trust fund and at no point in time whatsoever did the settlor ever inform the defendant that he wished to admit the two persons as trustees of the trust fund.

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[25] According to the defendant the SD is dated 12 June 2006 but at that point in time the settlor was fighting for his life and was in and out of the hospital frequently because of his serious health problems. In view of his rapidly declining physical condition and also his mental condition the settlor did not have the mental capacity to execute an important document such as the SD.

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[26] The defendant also questioned why and how the settlor had affixed his thumbprint instead of his signature on the SD.

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[27] If necessary, the defendant will rely on s. 8 of the Defamation Act 1957.

[28] The defendant denied that the plaintiff is entitled to aggravated and/or exemplary damages in any event based on the facts and circumstances of the instant case.

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[29] The defendant also averred that he need not apologise to the plaintiff as he was merely carrying out his responsibility as a member of the board of trustees for the trust fund in bringing the matter to the notice of the honorary secretary of the trust fund.

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A The Plaintiff's Reply

[30] In his reply to the defendant's defence which was dated 10 November 2009 and filed on the same date, encl. (5), the plaintiff joined issue with the defendant on his defence save insofar as it consisted of admissions and save as otherwise appearing in the plaintiff's reply.

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[31] On the issue of publication, the plaintiff denied para. 7 of the defence that the defendant did not publish or circulate the first letter to the other members of the board of trustees. The plaintiff averred that the defendant did or was responsible for the circulation and publication of the first letter.

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[32] Alternatively, the plaintiff contended that it was within the contemplation and foresight of the defendant that the publication of the first letter to the honorary secretary would result in the publication to the other members of the board of trustees.

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[33] On the issue of qualified privilege, the plaintiff averred that the defendant is not entitled to rely on the defence of qualified privilege. The plaintiff has also denied para. 10 of the defence in which the defendant has relied on the defence of qualified privilege and in which the defendant has particularised his defence of qualified privilege. The plaintiff has further put the defendant to strict proof of his defence of qualified privilege.

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[34] Alternatively, the plaintiff has averred that in publishing the first letter the defendant was actuated by malice. He has particularised the defendant's malice by repeating para. 12 of his statement of claim which deals with the acts and/or omissions of the defendant which are relevant to the plaintiff's claim for aggravated and/or exemplary damages.

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[35] The plaintiff has also averred that he was appointed the legal adviser to SAWS to, *inter alia*, advise SAWS on a series of letters issued by the defendant and two others to SAWS from on or about early 2008 and that SAWS had, in replying to the letters, threatened legal proceedings against the defendant.

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[36] Apart from that SAWS had also initiated disciplinary proceedings against the defendant arising, *inter alia*, from the letters issued by the defendant to SAWS.

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[37] On the issue of justification, the plaintiff denied para. 11 of the defence (which relies on justification as a defence) and that the contents of the first letter are true in fact and/or substance. The plaintiff has put the defendant to strict proof of his averments.

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Chronology Of Events After The Close Of Pleadings**A**

[38] Based on the minutes in the file, pleadings had closed by 3 February 2009. On that date the learned Deputy Registrar/Senior Assistant Registrar set the case down for case management on 27 April 2010.

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[39] On 27 April 2010, Mr Malik Reza who appeared for the plaintiff also mentioned on behalf of the defendant's counsel. He handed over the bundle of pleadings to the learned Deputy Registrar/Senior Assistant Registrar. He further informed her that the parties were in the process of getting ready the bundle of documents, agreed facts and issues to be tried.

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[40] The learned Deputy Registrar/Senior Assistant Registrar then directed the parties to file the common bundle of documents, agreed facts and issues to be tried. She set the case down for the next case management on 30 June 2010 for the parties to comply with her direction.

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[41] On 30 June 2010, Mr S Ravindran appeared for the plaintiff and Mr Patrick Dass appeared for the defendant. The learned Deputy Registrar was informed that the parties were attempting to settle the matter and they were in the process of complying with the pre-trial case management directions given earlier.

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[42] The learned Deputy Registrar set the case down for the next case management on 24 August 2010.

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[43] On this date, only the bundle of documents had been filed and the learned Deputy Registrar set the case down for the next case management on 7 January 2011 in order to give more time to the parties to comply with the rest of the pre-trial case management directions given earlier.

G**The Plaintiff's Wish To Settle The Suit Through Mediation**

[44] On this date, Mr Malik Reza who appeared for the plaintiff informed the learned Deputy Registrar that the plaintiff wished to request for the matter to be mediated as it involved the Buddhist society and that the defendant's counsel had just reverted back to the plaintiff's solicitors concerning the documents.

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[45] Mr Mahfuoz who appeared for the defendant left it to the court to give any direction.

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A [46] The learned Senior Assistant Registrar directed the parties to file the common bundle of documents, agreed facts, issues to be tried, opening statements and the lists of witnesses. He then set the case down for the next case management on 16 March 2011. He also informed the parties to set the matter down for mediation before a judge.

B [47] On 16 March 2011, Mr Rodney Khor appeared for the plaintiff. Learned counsel for the defendant was absent. The five types of documents had yet to be filed. The learned Deputy Registrar set the case down for the next case management on 12 May 2011.

C [48] On 12 May 2011, Mr Patrick Dass appeared for the defendant and undertook to inform the plaintiff's counsel of the direction from the court. He informed the court that the parties were waiting for the mediation date to be fixed.

D [49] The learned Deputy Registrar informed him that priority was given only for pre-2007 cases and that the parties had to wait or they could settle the matter out of court.

E [50] Mr Patrick Dass informed the court that the parties had failed to agree on the issues to be tried and that they wished to settle the matter by way of mediation.

[51] The learned Deputy Registrar then set the case down for the next case management on 18 August 2011.

F [52] On 18 August 2011, Mr Patrick Dass again appeared for the defendant and undertook to inform the plaintiff's counsel of the direction from the court. He informed the court that the parties were still waiting for the mediation date to be fixed. The defendant was also present. He informed the court that he is the senior assistant teacher of his school and he requested for the mediation to be fixed during the school holidays commencing on 19 November 2011.

G [53] The learned Deputy Registrar then directed the counsels to write to the Managing Deputy Registrar of the OCvC Division to get a suitable date and also his directions concerning the parties' wish to have the matter mediated.

H [54] She then set the case down for mediation, tentatively, on 21 November 2011. She also set the case down for the next case management on 21 November 2011.

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The Mediation Which Was Held On 17 April 2012

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[55] The next minute in the file is dated 17 April 2012. It recorded that Mr S Ravindran appeared for the plaintiff and Mr Patrick Dass appeared for the defendant. It also recorded that the plaintiff and the defendant were present, that the mediation was carried out by Tuan Zainal L Salleh at 2.30pm, that it took one hour and 30 minutes, that the defendant agreed to withdraw the letter, that the plaintiff's counsel requested the defendant to express regret in the matter even if the plaintiff was not claiming for an apology; that the plaintiff said that damage has been done to his name; that the defendant's counsel then said that the issue concerning the letter has been settled and that a letter would be sent to the secretary of the board and a copy to the plaintiff and the other members of the board; that there be no order as to cost; and that it was then recorded that the mediation was successful.

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Chronology Of Events Subsequent To The Mediation

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[56] On 16 May 2012, the case came up for case management. Mr S Ravindran and Cik Nasuha Mohd Ali appeared for the plaintiff. Mr Patrick Dass appeared for the defendant. The defendant was also present.

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[57] The plaintiff's learned counsel informed the learned Deputy Registrar that the matter had been mediated and that it was agreed that the plaintiff would withdraw the matter upon the defendant publishing the letter of apology but up to date the defendant has not published the letter.

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[58] Mr Patrick Dass then informed the court that the defendant told him that he (Mr Patrick Dass) had misled the defendant, that the defendant has refused to publish the letter (of apology), that he (Mr Patrick Dass) would discharge himself and that the defendant would appoint a new lawyer and proceed to trial.

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[59] The plaintiff's counsel enquired whether the matter ought to be referred back to Tuan Zainal L Salleh, who mediated the matter, for clarification of the status of the mediation.

[60] The learned Deputy Registrar then set the case down for the next case management on 30 May 2012.

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[61] However, about a week earlier, ie, on 21 May 2012, the case was managed by the learned Deputy Registrar who then set the case down for the next case management on 21 June 2012 before me (as there was a transfer order for my transfer from Criminal Court 1,

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- A** Kuala Lumpur to the OCvC 7, Kuala Lumpur effective 15 June 2011) for purposes of full trial since the mediation was unsuccessful as the defendant said, through his new counsel, Mr R Devadason, that he did not understand the terms of the settlement and he did not sign any agreement concerning the terms of the settlement.
- B** [62] The plaintiff's counsel, namely, Miss Nasuha Mohd Ali, informed the court that the plaintiff would be calling three witnesses.
- [63] Mr R Devadason informed the court that the defendant would be calling five witnesses.
- C** [64] On 21 June 2012, the case came before me for case management. Miss Nasuha Mohd Ali, the plaintiff's counsel, requested that the case be set down for full trial. The defendant was represented by Mr R Devadason.
- D** [65] I informed the parties that I know the present chief monk of the Buddhist Maha Vihara and that I might have met the defendant prior to 21 June 2012. I asked the parties to obtain the instructions from their clients whether they had any objection to me conducting the full trial. Mr R Devadason informed me that the defendant has no objection to me hearing the case.
- E**
- [66] I then set the case down for the next case management date on 27 June 2012 for the plaintiff's learned counsel to inform me whether his client had any objection to me conducting the full trial.
- F** [67] On 27 June 2012, Mr S Ravindran, learned counsel for the plaintiff, informed me that his client has no objection to me conducting the full trial.
- [68] Mr R Devadason informed me that he had informed me on the last occasion that his client has no objection to me conducting the full trial.
- G**
- [69] I directed the parties to file the agreed facts, issues to be tried, summary of case, list of witnesses and the witness statements of the witnesses before the next case management date. I then set the case
- H** down for full trial on 30 October 2012 and 31 October 2012.
- [70] I also set the case down for the next case management on 17 August 2012.
- I** [71] On 17 August 2012, the parties appeared before me and I set the case down for the last pre-trial case management on 5 October 2012 and for the parties to comply with my directions concerning the filing and exchange of the witness statements of the witnesses.

Decision Refusing Leave To The Plaintiff To File Additional Documents Concerning What Had Transpired During The Mediation Proceedings And Directing The Plaintiff To Re-Do The Witness Statement Of The Plaintiff Himself To Exclude All References To What Had Transpired During The Mediation Proceedings And To Re-File It For Use During The Full Trial

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[72] On 5 October 2012, the parties appeared before me in chambers for case management. I noted two matters.

[73] Firstly, I noted that the plaintiff had filed, without the prior leave of the court, a “plaintiff’s bundle of documents”, (vol. 2), encl. (17A), in which he had exhibited five letters.

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[74] The court found the inclusion of the first letter, dated 7 April 2009, and the second letter, dated 21 April 2009, to be in order.

[75] These two letters are as follows:

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- (a) The first letter is a letter dated 7 April 2009 issued by the plaintiff’s solicitors to the defendant complaining of the contents of the first letter, in which numerous references were made to the plaintiff, setting out the purport and effect of the references which were itemised into five separate charges, claiming that the charges are irresponsible and unacceptable charges, that the plaintiff strenuously denies the same, claiming that the charges constitute a most serious and damaging libel against him, given his standing in the legal profession, asking that the defendant do the following:

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- (i) Publish, in a letter addressed to all the trustees of the K Sri Dhammananda trust, a full and complete withdrawal and apology in a manner and in terms to be approved by the plaintiff’s solicitors on the plaintiff’s behalf;

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- (ii) Give the plaintiff his written assurance and undertaking that he will not further publish the first letter and will not publish, whether orally or in writing words of a similar purport and effect concerning the plaintiff as those which appeared in the first letter;

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- (iii) Pay the plaintiff a proper and suitable sum as damages for the injury and embarrassment to his reputation, for which the plaintiff’s solicitors await the defendant’s proposal; and

- (iv) Indemnify the plaintiff in respect of the costs the plaintiff has incurred and will have to incur in this matter;

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- A And asking the defendant to reply within 72 hours, given the gravity of the libel and the manner and extent of its publication, and, in the meantime, reserving to the plaintiff all his rights in the matter; and
- B (b) The second letter is a letter dated 21 April 2009 issued by the defendant's previous solicitors in reply to the plaintiff's solicitors' letter dated 7 April 2009 stating that the defendant stands by his letter, is prepared to justify the same at any time and at any place, deems the plaintiff's claim preposterous, takes a dim view of the same and reserves all his rights in the matter.
- C **The Three Letters Dated 19 April 2012, 26 April 2012 And 10 May 2012 Ruled Inadmissible By This Court**
- D [76] However, the court, on its own motion, found that the inclusion of the third, fourth and fifth letters was not in order as the court was of the view that the three letters were irrelevant and inadmissible in evidence and hence, could not be relied upon by the plaintiff to support his claim for aggravated and/or exemplary damages at the full trial.
- [77] The reasons are as follows.
- E [78] These three letters were dated 19 April 2012, 26 April 2012 and 10 May 2012, respectively. They were addressed to the defendant's former solicitors.
- F [79] The first letter, dated 19 April 2012, made express reference to the mediation which was held on 17 April 2012 at the Mediation Centre of the Kuala Lumpur Court before Tuan Zainal bin L Salleh. It was written to confirm what had transpired during the mediation, ie, that it was agreed and recorded that, in consideration of the defendant publishing a letter (the terms of which were agreed between the parties) to the honorary secretary of the trust fund and copied to the trustees
- G of the trust fund and the plaintiff, the plaintiff will withdraw this suit with no order as to costs.
- H [80] It also enclosed a copy of the letter to be published by the defendant for the further action of the defendant. It further informed the defendant's former solicitors that the plaintiff's solicitors would take the necessary steps to withdraw the action upon receipt of confirmation (from the defendant's solicitors) that the letter has been received by the intended recipients.
- I [81] The second letter, dated 26 April 2012, referred to the first letter dated 19 April 2012 and inquired from the defendant's former solicitors whether the defendant had published the letter in the draft format referred to in the first letter dated 19 April 2012.

[82] The third letter, dated 10 May 2012, referred to the two previous letters, dated 19 and 26 April 2012, respectively, and inquired whether the defendant had published the letter in the draft format referred to in the first letter dated 19 April 2012. A

[83] Therefore, it was clear to the court that the first of these three letters had expressly referred to a mediation in which one party, ie, the plaintiff has claimed was successful and his solicitors had followed up by writing to the other party, ie, the defendant's previous solicitors, to confirm that it was successfully mediated, the terms of the agreement and enclosing a draft of the letter, in the format prepared by the plaintiff's solicitors, which the plaintiff has claimed that the defendant had agreed to publish, and that the two other letters were merely follow up letters to inquire whether the defendant had in fact issued out the letter in the format drafted by the plaintiff's solicitors. B C

[84] It was also clear to the court that, subsequently, the defendant has claimed that he was misled by his previous solicitors and that he did not agree to the terms of the agreement as set out in the first letter, dated 19 April 2012, issued by the plaintiff's solicitors. D

[85] However, what is of great significance and concern to the court is that both parties did not sign any agreement setting out the terms of the settlement which was arrived at as claimed by the plaintiff and the plaintiff's solicitors. E

[86] It was further clear to the court that the defendant's previous solicitors have discharged themselves and the defendant has engaged new solicitors, and through his present solicitors, the defendant has informed the court that he wishes the matter to be tried. The defendant had also taken strong objection, through his present solicitors, to the undated letter in draft form concerning the admission of liability by the defendant which was prepared by the plaintiff's solicitors using the letterhead of the defendant. F G

[87] After the refusal of the defendant to issue the letter as per the draft prepared by the plaintiff's solicitors, the plaintiff's solicitors had also informed the court that the plaintiff wishes the matter to be tried since the defendant has disputed that he had agreed to the terms of settlement as claimed by the plaintiff and the plaintiff's solicitors. H

[88] The court was of the view that the mediation had failed and could not be said to have been successful since there was no agreement in writing which was signed by both the parties concerning the terms of the settlement arrived at in the mediation held on 17 April 2012 at the Mediation Centre of the Kuala Lumpur Court before Tuan Zainal I

A bin L Salleh including the issue of the letter by the defendant in the format drafted by the plaintiff's solicitors and enclosed in the first of the three letters mentioned above.

B [89] It follows, therefore, that as the mediation had failed or had not been effectively concluded by the signing or execution of a settlement agreement setting out its terms, the court took the view that the plaintiff could not rely on the three letters in order to establish at the full trial of the plaintiff's suit that there was, as alleged by him in the first of the three letters, a successful mediation held on 17 April 2012 at the Mediation Centre of the Kuala Lumpur Court before Tuan Zainal bin L Salleh but which the plaintiff is alleging that the defendant has refused to perform his side of the settlement by refusing to publish a letter in the format drafted by the plaintiff's solicitors which was attached to the letter dated 19 April 2012 and to use the three letters to support his claim for aggravated damages against the defendant.

C [90] The court, consequently, directed the plaintiff's counsel to re-file vol. 2 of the plaintiff's bundle of documents to exclude the three letters. This direction has been complied with and the new vol. 2 of the plaintiff's bundle of documents was filed on 7 November 2012, encl. (23). It had omitted the three letters. It was filed without prejudice to the right of the plaintiff to file a notice of appeal to the Court of Appeal against the decision of this court in directing the plaintiff's counsel to re-file vol. 2 of the plaintiff's bundle of documents to exclude the three letters.

E [91] Secondly, I noted that in his answer to the last question, ie, question 30, in his witness statement, filed on 5 October 2012, the plaintiff has mentioned what had transpired during the mediation on 17 April 2012 before Tuan Zainal b L Salleh in order to support his claim for aggravated damages against the defendant.

G [92] The question and answer read as follows:

30 Q : **Please explain the basis upon which you claim for aggravated damages.**

H A: The allegations in the 1st Offending Letter are baseless and blatantly false. Despite that, the Defendant pleads justification and seeks to prove that the allegations against me are true in substance and fact.

I Despite having the opportunity of withdrawing the 1st Offending letter, the Defendant ignored the invitation to do so and went to repeat some of his allegations in the 2nd Offending Letter.

Further, prior to the trial of this matter, the defendant and I mutually agreed to have this matter mediated at the Mediation Centre of the Kuala Lumpur High Court. The matter was mediated by Tuan Zainal Bin Saleh on 17.4.2012. The Defendant and I were present at the Mediation with our respective solicitors. The Mediation was successful in that the defendant agreed to issue a letter a letter to the Honorary Secretary of the Board of Trustees, and copied to the other trustees, wherein he would, inter alia, withdraw the 1st and 2nd Offending Letters and express his regret and remorse in issuing those letters and I would, upon the letter being issued, withdraw this matter with no order as to costs.

A

B

These terms and the contents of the proposed letter were read out to the Mediator in the presence of the Defendant and I, and our respective solicitors.

C

My solicitors then prepared a draft of the proposed letter and sent it over to the Defendant's (then) solicitors, Patrick Dass & Co, for the Defendant to adopt and to issue. A copy of my solicitors' letter dated 19.4.2012 and draft proposed letter is found at CBD 2 / ...

D

There was no response from the Defendant's (then) solicitors, despite 2 subsequent reminders, dated 26.4.2012 and 10.5.2012, being sent to them CBD 2 / ...

E

When this matter was called up for Case Management before the learned Registrar on 16.5.2012, counsel for the Defendant informed the Court that the Defendant wanted to proceed with trial. Counsel then said that in those circumstances he can no longer continue to act for the Defendant and that new solicitors would be appointed to act for the Defendant.

F

It is plain that despite having had numerous opportunities to retract the baseless and the blatantly false allegations, the Defendant has not done so and it is apparent that he wishes to perpetuate those allegations. (emphasis added)

G

[93] I was of the view that in the absence of a written agreement duly signed by both the plaintiff and defendant setting out the terms of the settlement including the contents of the letter to be issued out by the defendant to the honorary secretary of the trust fund and the other trustees of the trust fund the mediation was aborted and the plaintiff cannot rely on his alleged version of what had transpired during the failed mediation to support his claim for aggravated damages against the defendant in the full trial.

H

I

A [94] In my judgment, the references to the mediation proceedings were inadmissible just like any other case involving correspondences marked “without prejudice” or other communications to that effect between parties who were attempting to settle a dispute but which did not culminate in a settlement.

B [95] I, consequently, directed learned plaintiff’s counsel to redo the witness statement of the plaintiff without making any reference to the failed mediation and to re-file it for use in the full trial.

C [96] I also vacated the full trial dates on 30 and 31 October 2012 which I had fixed earlier on 17 August 2012, during case management. This was done in order to make provision for the time which may be taken by the plaintiff in appealing my decisions and directions to the Court of Appeal, as Mr Gopal Sreenevasan, learned counsel for the plaintiff, who appeared together with Mr S Ravindran, had indicated to me that he was aggrieved by my decisions and directions on the preliminary issue raised by me and that he had not been sufficiently heard by me before I made my decisions and directions.

[97] I then set the matter down for the next case management on 6 November 2012.

E **The Plaintiff’s Appeal To The Court Of Appeal And His Application To Stay The Proceedings Pending The Outcome Of His Appeal To The Court Of Appeal**

F [98] On 6 November 2012, both parties appeared before me for case management.

G [99] Mr S Ravindran, learned counsel for the plaintiff, informed me that being dissatisfied with my decisions and directions as mentioned above, the plaintiff has, on 31 October 2012, filed a notice of appeal to the Court of Appeal against my decisions and directions made on 5 October 2012.

[100] He then applied orally to stay the proceedings but it was objected to by Mr R Devadason who submitted that a formal application for stay ought to be filed.

H [101] I upheld his objection and I, consequently, dismissed the plaintiff’s oral application to stay the proceedings pending the outcome of the plaintiff’s appeal to the Court of Appeal.

I

- [102]** On 4 December 2012, the plaintiff filed a notice of application, encl. (18), together with an affidavit in support, encl. (19), affirmed by the plaintiff. In his affidavit in support, the plaintiff has stated that if the proceedings are not stayed and the matter proceeds to trial his appeal will be rendered nugatory. **A**
- [103]** This is because if his appeal is allowed by the Court of Appeal the references to the mediation proceedings on 17 April 2012 could be relied on for the purposes of trial and this would have a direct effect on the damages that he would be entitled to. He also stated that the stay would only be for a limited period as the appeal could be disposed off by the Court of Appeal in three months. **B**
- [104]** In his affidavit in reply, encl. (24), affirmed on 19 December 2012, and filed on 24 December 2012, the defendant objected to the plaintiff's application for stay and asked that it be dismissed on the following grounds. **C**
- [105]** Firstly, that the mediation was a failure from the outset and that the defendant's former solicitor did admit to the defendant that the defendant was misled by him (his former solicitor). It was because of that reason that the defendant's former solicitor had discharged himself. **D**
- [106]** Secondly, the plaintiff's solicitors not only drafted the purported letter of apology, which was enclosed together with the plaintiff's solicitors' letter dated 19 April 2012, to be issued out by the defendant, they had also copied the defendant's letterhead from the computer to make it appear as if it was prepared by the defendant or the defendant's previous solicitors, as can be seen from the enclosed draft copy of the purported letter of apology. **E**
- [107]** Thirdly, the defendant had refused to execute the letter of apology because there was nothing to apologise as his letter dated 18 March 2009 ("the first letter") was not defamatory of the plaintiff. **F**
- [108]** Fourthly, as a trustee of the trust fund, the defendant owes a duty to the trust fund to see that it is properly managed and he is not there to warm the seat. **G**
- [109]** Fifthly, he has been involved in the Buddhist movement for a very long time and his only concern is that the trust fund is properly managed. **H**
- [110]** Sixthly, the plaintiff has not shown any special circumstances (to justify the granting of the stay). **I**

A [111] Finally, he raised the question “How can the proceeding or the documents during the mediation process be tendered in court during the trial when at no time did he sign the purported letter of apology?”.

B [112] In response to the defendant’s affidavit in reply, the plaintiff affirmed a second affidavit, encl. (25), which he filed on 9 January 2013.

C [113] In his second affidavit, the plaintiff denied that the mediation was a failure. The plaintiff reiterated that at the conclusion of the mediation proceedings, an agreement was reached between the parties. The plaintiff also denied the third, fourth and fifth reasons relied upon by the defendant to oppose the stay application.

[114] The plaintiff also stated that the appeal was scheduled to be heard by the Court of Appeal on 19 February 2013.

D [115] On 6 February 2013, both parties came before me for the hearing of the formal application for stay of proceedings. Mr S Ravindran, learned counsel for the plaintiff, informed me that his firm had written in to (the Mediation Centre of the Kuala Lumpur Court) to ask for a copy of the notes of the mediation proceedings but his firm was told orally that the mediation proceedings are confidential and no notes of the mediation proceedings would be supplied.

[116] He also submitted that there was no denial by the defendant’s former counsel that the mediation was successful and that the defendant had agreed to issue the letter of apology.

F [117] He cited three cases in support of the plaintiff’s application for stay. The three cases are *The Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan and Another Case* [1993] 4 CLJ 98, *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 and *Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd* [2005] 2 CLJ 465; [2005] 3 MLJ 132.

G [118] Mr R Devadason objected to the plaintiff’s application for stay on the ground that nugatoriness is not a special circumstance in this instance and that the references to the mediation proceedings could not be included for the purpose of the trial since the defendant at no time agreed to the mediation on the terms alleged by the plaintiff.

H [119] He cited two cases in support of his objection. The two cases are *Serangoon Garden Estate Ltd v. Ang Keng* [1953] 1 LNS 98; [1953] MLJ 116 and *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406.

I

[120] After having heard both parties and considered their oral and written submissions, I agreed with and accepted the submissions of Mr S Ravindran, learned counsel for the plaintiff. I was of the view that based on the three cases cited by him that the plaintiff would be prejudiced if I did not allow the plaintiff's application for stay as the plaintiff's appeal to the Court of Appeal would be rendered nugatory in the event the plaintiff succeeds in the Court of Appeal and the outcome is in favour of the plaintiff.

[121] Therefore, I granted a stay of the proceedings of the plaintiff's suit pending the outcome of the plaintiff's appeal to the Court of Appeal, with costs of RM5,000 to be paid by the plaintiff to the defendant.

Reasons For The Decisions And Directions

[122] I have already explained in part why I had decided and directed in that manner in the earlier part of my grounds of judgment.

[123] The rest of the reasons are stated below.

[124] Order 34 of the Rules of Court 2012 ("RC 2012") which provides for case management confers wide discretion on the court, in the course of managing a case, to make decisions and directions to ensure the just, economical and expeditious disposal of the case. In my judgment, in order to achieve that objective the court is fully empowered to exclude the filing of documents and witness statements which are clearly inadmissible.

[125] In the instant case, there was no dispute that the parties went through a mediation process on 17 April 2012 before Tuan Zainal b L Salleh at the Mediation Centre of the Kuala Lumpur Court.

[126] The Rules of the High Court 1980 ("RHC 1980") which have been repealed by the Rules of Court 2012 ("RC") 2012 on 1 August 2012 do not have any provision relating to mediation.

[127] Nevertheless, while I was presiding in the High Court at Penang in the year 2003 I had construed and interpreted O. 34 r. 4 of the RHC 1980 to confer a discretion on the High Court to direct the parties in cases which the High Court considered to be suitable for disposal through mediation to refer their cases to the Malaysian Mediation Centre ("MMC") of the Bar Council for mediation by a qualified mediator in accordance with the Mediation Rules of the MMC. I had done that because of three reasons. The first was the huge backlog of old cases pending in the Penang High Court at that time. The second was the absence of any express power conferred on judges by the law, ie, the

- A Federal Constitution or the Courts of Judicature Act 1964 or the Rules of the High Court 1980, to dispose off cases through mediation instead of by adjudication or trial or hearing. The third reason was that the MMC had a large pool of advocates and solicitors who were qualified and trained mediators (see “Court Annexed Mediation” in *Mediation & Arbitration in Asia Pacific Conference Proceedings* edited by Syed Khalid Rashid & Syed Ahmad Idid).
- B

[128] On 13 August 2010, the former Chief Justice of Malaysia, the Right Honourable Tun Zaki bin Tun Azmi issued a practice direction, ie, Practice Direction No. 5 of 2010 (“practice direction”), on mediation which came into effect on 16 August 2010.

C

[129] Paragraph 1 of the practice direction directs that with effect from 16 August 2010, all judges of the High Court and its Deputy Registrars and all judges of the Sessions Court and Magistrates and their Registrars may, at the pre-trial case management stage as stipulated under O. 34 r. 4 of the Rules of the High Court 1980 (since repealed by the Rules of Court 2012) or by order for directions provided in O. 19 r. 1(1)(b) of the Subordinate Courts Rules 1980 (since repealed by the Rules of Court 2012), give such directions that the parties facilitate the settlement of the matter before the court by way of mediation.

D

E

[130] The term “judge” in the practice direction is stated in para. 1.1 to include a judge or Judicial Commissioner of the High Court, judge of the Sessions Court, Magistrate or a Registrar of the High Court.

F

[131] Paragraph 2.1 of the practice direction which deals with the objective of the practice direction expressly states that the objective of the practice direction is to encourage parties to arrive at an amicable settlement without going through or completing a trial or appeal. The benefit of settlement by way of mediation is that it is accepted by the parties, expeditious and it is final. It also states expressly that mediation is a voluntary process and the parties can opt to have their dispute mediated first before proceeding to trial. It also states that if the mediation fails the parties are entitled to have the suit tried by the court.

G

[132] Paragraph 2.2 of the practice direction states that the practice direction is intended to be only a guideline for settlement.

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[133] In para. 5 of the practice direction two modes of mediation are dealt with.

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[134] The first is judge-led mediation. Annexure A contains four short paragraphs regulating judge-led mediations. Paragraph 4 of Annexure A (judge-led mediation) deals with the procedure to be followed by the mediating judge in the event the mediation is successful. **A**

[135] It states as follows: **B**

If the mediation is successful, the Judge mediating shall record a consent judgment on the terms as agreed to by the parties.

[136] The second is mediation by a mediator agreeable to by both parties. Annexure B (mediation by any other mediator) contains three long paragraphs regulating mediation by any other mediator. One of them is para. 1. It deals with the choosing by the parties of a mediator from the list of certified mediators furnished by the Malaysian Mediation Centre (“MMC”) set up under the auspices of the Bar Council, or any other mediator chosen by the parties. **C**

[137] Sub-paragraph 1.1 of Annexure B states as follows: **D**

A mediator may be chosen by the parties from the list of certified mediators furnished by the Malaysian Mediation Centre (“MMC”) set up under the auspices of the Bar Council, or any other mediator chosen by the parties. **E**

[138] Sub-paragraph 1.3 of Annexure B which deals with the procedure to be followed during the mediation proceedings states as follows:

Any mediator so chosen by the parties may agree to be bound by the MMC Code of Conduct and the MMC Mediation Rules, or not at all. **F**

[139] Paragraph 1 of Annexure B expressly requires the mediation process which is conducted by the MMC to be governed by the mediation procedure as set out in the Mediation Rules. **G**

[140] Paragraphs 7, 13 and 18 of the MMC Mediation Rules which deals with the agreement to mediate, the settlement agreement and the termination of the mediation, respectively, state as follows:

7. Agreement to Mediate **H**

Before mediation is carried out, the parties will enter into an agreement for appointment of Mediator (“the Agreement to Mediate”).

...

I

A 13. Settlement Agreement

No settlement reached in the Mediation will be binding until it has been reduced to writing and signed by and or on behalf of the parties.

B ...

18. Termination of Mediation

The mediation shall be terminated:

- C**
- (a) By the execution of a settlement agreement by the parties;
 - (b) By a written declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile; or
 - (c) By a written declaration of a party or parties to the effect that the mediation proceedings are terminated.

D [141] Paragraph 3 of Annexure B (mediation by any other mediator) deals with the settlement agreement and the procedure to be followed in the event the mediation is successful. Paragraph 3.1 requires a settlement agreement to be signed or the terms of the settlement to be recorded as a consent judgment.

E [142] It states as follows:

F any agreement consequent upon a successful mediation may be reduced into writing in a Settlement Agreement signed by the parties but in any case the parties shall record the terms of the settlement as a consent judgment.

G [143] From my reading of the provisions as set out above relating to the procedure to be followed in the event the mediation is successful it is clear that it is essential for the terms of the settlement agreed to by the parties to be reduced into writing and either recorded as a consent judgment by the judge leading the mediation or contained in a settlement agreement signed by the parties where the mediation is conducted by a mediator agreeable by both parties and the parties shall record the terms of the settlement as a consent judgment.

H [144] In order to ensure that the parties have willingly agreed to mediate their dispute and to treat all disclosures, admissions and communications made under a mediation session on a strictly “without prejudice” basis as they do not form part of any record and the mediator shall not be compelled to divulge such records or testify as a

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witness or consultant in any judicial proceeding, unless all parties to both the court proceedings and the mediation proceedings consent to its inclusion in the record or to its other use, para. 6.1 of the practice direction requires each of them to execute a mediation agreement in “Form 1”.

A

[145] Form 1 expressly states as follows:

B

We, the solicitors representing the abovementioned parties hereby consent to refer this matter for mediation for the purpose to reach an amicable settlement and to the satisfaction of all parties.

We also agree that all disclosures, admissions and communications made under a mediation session are strictly “without prejudice”. Such communications do not form part of any record and the mediator shall not be compelled to divulge such records or testify as a witness or consultant in any judicial proceeding, unless all parties to both the Court proceedings and the mediation proceedings consent to its inclusion in the record or to its other use.

C

D

[146] As for confidentiality of all disclosures, admissions and communications made under a mediation session conducted in accordance with the MMC Mediation Rules this is dealt with in Form 1 as set out earlier and also in para. 6.2(a) which reproduces the second paragraph in Form 1.

E

[147] It states as follows:

All disclosures, admissions and communications made under a mediation session are strictly “without prejudice”. Such communications do not form part of any record and the mediator shall not be compelled to divulge such records or testify as a witness or consultant in any judicial proceedings, unless all parties to both the Court proceedings and the mediation proceedings consent to its inclusion in the record or to its other use.

F

G

[148] Rule 15 of the MMC Mediation Rules also deals with confidentiality of all communications made in the mediation process including views expressed or suggestions made by another party with respect to a possible settlement of the dispute, admissions made by another party in the course of the mediation proceedings and the mediator shall not be compelled to divulge such records or to testify as a witness, consultant, arbitrator or expert in regard to the mediation in any arbitral, judicial or other proceedings.

H

I

A [149] Rule 15 reads as follows:

15. Confidentiality

B 15.1 All communications made in the mediation, including information disclosed and views expressed, are made on a strictly “without prejudice” basis and shall not be used in any proceedings.

C 15.2 All records, reports or other documents including anything electronically or any other information produced or received by a mediator while serving in that capacity shall be privileged.

D 15.3 The Mediator of the MMC (or any employee, officer or representative for or arising in relation to mediation) shall not be compelled to divulge such records or to testify as a witness, consultant, arbitrator or expert in regard to the mediation in any arbitral, judicial or other proceedings.

15.4 The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceedings:

E (a) Views expressed or suggestions made by another party with respect to a possible settlement of the dispute;

(b) Admission made by another party in the course of the mediation proceedings;

F (c) Proposal made or view expressed by the Mediator; or

(d) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the Mediator.

G [150] Rule 16 of the MMC Mediation Rules expressly provides that there shall be no stenographic record, no transcript or formal record and no audio-visual recording will be made of the proceedings.

[151] The rule reads as follows:

H 16. No Stenographic Record, Audio-Visual Recording or Formal Record

There shall be no stenographic record, no transcript or formal record. No audio-visual recording will be made of the proceedings.

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[152] The RC 2012 which came into force on 1 August 2012, ie, after the mediation, which was held on 17 April 2012, before Tuan Zainal bin L Salleh at the Mediation Centre of the Kuala Lumpur Court Complex, has a provision, ie, O. 34 r. 2(2)(a), which allows the court to give directions to refer a case for mediation in accordance with any practice direction for the time being issued in order to secure the just, expeditious and economical disposal of the action.

[153] The provision reads as follows:

Pre-trial case management when directed by the court (O. 34, R. 2)

2 (1) ...

(2) *At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including -*

(a) **mediation in accordance with any practice direction for the time being issued;**

(b) ...

(c) *the period within which the parties are to file a bundle of all documents that will be relied on or referred to in the course of the trial by any party, including documents referred to in the witness statement of a witness;*

(d) - (l) ...

(m) *the period within which the parties have to exchange and file witness statements of all witnesses who may give evidence at the trial;*

(o) ...

(3) - (5) ... (emphasis added)

[154] The word “mediation” is neither defined in the RC 2012 nor in the practice direction.

[155] In *Osborn’s Concise Law Dictionary*, 11th edn., the word “mediation” is given the following meaning:

A form of a non-adversarial alternative dispute resolution (q.v.). Sometimes this term is used interchangeably with conciliation (q.v.). *The parties in dispute employ a neutral third party as a mediator who*

- A will seek to promote communication between the parties. Ultimately, it is hoped that the mediator's exploration of the case privately with each side will lead to common ground emerging between the parties upon which a settlement of the dispute may be based. However, this process does not guarantee a resolution of a dispute as such depends upon the agreement of the parties, the mediator having no power to decide the dispute. It is encouraged as a process in
- B civil and family proceedings. (emphasis added)

[156] In *Black's Law Dictionary*, 9th edn., the word "mediation" is given the following meaning:

- C 1. A method of nonbinding dispute resolution involving a **neutral third party who tries to help the disputing parties reach a mutually agreeable solution**; CONCILIATION. - Also termed case evaluation; facilitated negotiation. (emphasis added)

[157] In the *Concise Oxford English Dictionary*, 10th edn. (revised), the word "mediate" is given, *inter alia*, the following meaning:

- D "mediate" 1 intervene in a dispute to bring about an agreement or reconciliation. ...
- DERIVATIVES mediately adv. mediation n. mediator n. mediatory ... adj. (emphasis added)

- E [158] Therefore, in my view the word "mediation" used in O. 34 r. 2(2)(a) of the RC 2012 can be construed to mean "the process of intervening in a dispute to bring about an agreement or reconciliation" or as per the meanings given in *Osborn's Concise Law Dictionary* and *Black's Law Dictionary*.

- F [159] Apart from the practice direction and the MMC Mediation Rules which have been referred to above which seek to regulate the mediation process and O. 34 r. 2(2)(a) of the RC 2012 which confers a discretion on the court to refer cases for mediation in accordance with the practice
- G direction, there is also a Mediation Act 2012 (Act 749) which was passed by Parliament. It came into force on 1 August 2012 (see P.U. (B) 252 2012 dated 30 July 2012).

- H [160] However, the court notes that it expressly states in s. 2 of the Mediation Act 2012 that it does not apply to any mediation conducted by a judge, magistrate or officer of the court pursuant to any civil action that has been filed in court.

- I [161] Nevertheless, in my view it is a useful guide to the understanding of the concept of mediation and the mediation process as it contains provisions which are usually applied to the mediation process.

[162] The word “mediation” is defined in s. 3 of the Mediation Act 2012. A

[163] The definition reads as follows:

“mediation” means a voluntary process in which **a mediator** facilitates communication and negotiation between parties to **assist the parties in reaching an agreement regarding a dispute**; B
(emphasis added)

[164] From my understanding of mediation and mediation proceedings, the mediation proceedings before the mediator are conducted voluntarily in private and in confidence between the parties and the mediator. There is, generally no record made of the proceedings although the mediator may make notes of the presence of the parties before the mediator, the date and place of the mediation, the wishes of each of the parties, the proposal or proposals by each party to settle the dispute and the outcome of the mediation including the term or terms of any settlement arrived at by the parties. C D

[165] Section 15 of the Mediation Act 2012 which deals with confidentiality expressly provides that no person shall disclose any mediation communication. There are exceptions to this general rule. Two of them are relevant in the context of the present case. One is that the disclosure is made with the consent of the parties and the other is that the disclosure is required under any other written law for the purposes of implementation or enforcement of a settlement agreement. E

[166] Section 16 of the Mediation Act 2012 which deals with privilege expressly provides that any mediation communication is privileged and is not subject to discovery or be admissible in evidence in any proceedings. However, there are exceptions to it. One of the exceptions is if the parties, the mediator and the non-party have expressly waived the privilege in writing. F G

[167] My understanding of the mediation proceedings is fortified by what was informed to me on 6 February 2013 by Mr S Ravindran, learned counsel for the plaintiff, that their endeavour to obtain a copy of the notes of the mediation proceedings was unsuccessful and they were told orally that the mediation proceedings are confidential and no notes of the mediation proceedings will be provided. H

[168] It is noteworthy that there is no provision in the law, for the filing of a notice of appeal against the outcome of a mediation proceeding. There is also no provision in the law for the filing of an application for judicial review of the outcome of a mediation proceeding. I

- A To my mind this is because a mediator does not hear evidence and does not make any decision whatsoever for the parties embroiled in a dispute unlike a judge or the court after a full trial and upon applying the law of evidence, the law of procedure and the substantive law regulating the subject matter of the dispute.
- B [169] The role of the mediator is merely to facilitate a settlement between the parties to the dispute in an informal atmosphere. It is an alternative method of resolving a dispute between parties without the parties having to undergo a trial which is usually time consuming and also expensive as costs usually follow the event as provided in the
- C RC 2012 which means that the winning party takes all and the losing party has to pay for his opponent's costs over and above the judgment sum awarded to the winning party by the court.
- D [170] At the conclusion of a successful mediation, the parties have to sign a settlement agreement to record their settlement and it is absolutely essential that the terms of the settlement agreement are clearly spelt out in the settlement agreement. Thereafter, the parties have to appear before the judge or court to have a consent judgment recorded by the judge or court as per the terms of the settlement agreement or
- E if the parties do not wish the terms to be disclosed to the judge or court the parties must, nevertheless, have a consent judgment recorded by the judge or court without disclosing the terms of the settlement. Once it is recorded the suit comes to an end and if the plaintiff withdraws the suit it will be struck out by the judge or court.
- F [171] Reverting back to the instant case, the undisputed facts show that no settlement agreement was signed by the parties and the parties have also not initialled on the draft of the letter which according to the plaintiff and the plaintiff's counsel was in the format which was agreed to by the defendant because the contents of the proposed letter were
- G read out during the mediation proceedings and consented to by the defendant and the defendant's solicitors.
- H [172] Before me on 5 October 2012, there was also no affidavit affirmed by Mr Patrick Dass, the defendant's former counsel, to support the assertion of the plaintiff and the plaintiff's counsel. That being the case and coupled with the clear refusal of the defendant to issue a letter of apology to the honorary secretary of the trust fund and copied to the other trustees of the trust fund, in the format as drafted by the plaintiff and the plaintiff's counsel, in order to honour the alleged terms of settlement, on the ground that the defendant was misled into agreeing
- I to the settlement and the defendant's former solicitors having discharged themselves, the court was left with no alternative but to have the

plaintiff's claim tried and to disallow the plaintiff from relying on the three letters and his version of the events which transpired during the mediation on 17 April 2009 in his quest to prove his claim for aggravated damages against the defendant. **A**

[173] I noted that there are five golden threads running through the mediation process as provided in the practice direction and the MMC Mediation Rules. They are as follows: **B**

(a) It is voluntary;

(b) It is private; **C**

(c) The communications are confidential and are "without prejudice" and will not be allowed to be disclosed or used in a court of law or any other proceedings unless consented to by both the parties;

(d) Where the mediation is successful the parties either sign a settlement agreement before the mediator or enter a consent judgment before the judge or court; and **D**

(e) Where the mediation is not successful the parties can have the case tried by the court. **E**

Relevancy And Admissibility Of Evidence

[174] Section 5 of the Evidence Act 1950 ("EA") expressly allows evidence to be given of facts in issue and relevant facts. However, the explanation to the section limits the scope of the section by disallowing any person from giving evidence of a fact which the person is disentitled to prove by the law relating to civil procedure. **F**

[175] The section and the explanation read as follows:

CHAPTER II

RELEVANCY OF FACTS

General

Evidence may be given of facts in issue and relevant facts **G**

- 5.** Evidence may be given in any suit or proceeding of the existence or non-existence or every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others. **H**

Explanation - This section shall not enable any person to give evidence of a fact which he is disentitled to prove by the law relating to civil procedure. **I**

A ILLUSTRATIONS

- (a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue:

- B** A's beating B with the club;
A's causing B's death by the beating; and
A's intention to cause B's death.

- C** (b) A a party to a suit does not comply with a notice given by B the other partly to produce for B's inspection a document referred to in A's pleadings. This section does not enable A to put the document in evidence on his behalf in that suit, otherwise than in accordance with the conditions prescribed by the law relating to civil procedure.

- D** [176] Section 23 of the EA expressly disallows a person from proving an admission in a civil case if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

- E** [177] The section reads as follows:

Admissions in civil cases when relevant

- F** 23. In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

- G** Explanation - Nothing in this section shall be taken to exempt any advocate from giving evidence of any matter of which he may be compelled to give evidence under section 126.

- H** [178] In view of the confidentiality of the communications made by the parties during the mediation proceedings before Tuan Zainal bin L Salleh on 17 April 2012 I am of the view that the three letters are privileged documents and are protected from production during the full trial of the plaintiff's suit on the following grounds:

- I** (a) The three letters are not relevant within the meaning of s. 5 of the EA since none of the three letters are relevant to any of the facts in issue and the mediation proceeding is not a relevant fact to be proved during the full trial because there was no settlement

agreement signed by both the parties or a consent judgment recorded by the court to substantiate the allegations of the plaintiff and his learned counsel that the mediation was successful and that the defendant had agreed to the terms of the settlement as alleged by both of them; and

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- (b) Section 23 of the EA expressly protects the three letters from disclosure in the full trial of the plaintiff's suit as there was some implied agreement between the parties against their production during the full trial.

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[179] Therefore, the three letters are protected from disclosure at the trial of the plaintiff's suit and the defendant is also entitled and justified to refuse to answer questions posed to him during the trial concerning what had transpired during the mediation proceedings before Tuan Zainal bin L Salleh.

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[180] The following excerpts from *Halsbury's Laws of Malaysia*, vol. 1, pp. 405, 406, 435 and 436 concerning documents which are protected from production are relevant and are applicable to the three letters in the instant case:

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[10.3.323] Documents protected from production ... The grounds on which this protection can be claimed can be classified under the following main heads: (1) legal professional privilege (see [10.3.325] and following); (2) public interest immunity (see [10.3.346] and following); (3) that the documents in question may tend to incriminate the party or his or her spouse (see [10.3.354]); (4) that the production is contrary to some statutory provision which imposes secrecy (see [10.3.355]); (5) that production is contrary to some express or implied agreement between the parties (see [10.3.356]); and (6) that production would, in the circumstances of the particular case, be oppressive (see [10.3.357]). The first five of these grounds protect documents from disclosure at the trial as well as on discovery, and are also grounds for refusal to answer interrogatories (see [10.3.398]) or questions asked of a witness at the trial (see [10.3.353]-[10.3.354]).

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None of these grounds, except 'oppression', is now based on the discretionary power of the court (They are either statutory or have become definite rules based on case law) ... for 'confidentiality' is not a separate head of privilege (Disclosure of medical reports is not permissible if such would be harmful to the mental health of the applicant), although it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest.

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- A** [10.3.356] Agreement not to disclose; without prejudice; communications An agreement between the parties not to disclose a particular document or information is a ground for refusing discovery of that document or information. (see *Rabin v. Mendoza & Co* [1954] 1 All ER 247, [1954] 1 WLR 271, CA (Eng); *Berry and Stewart v. Tottenham Hotspur Football and Athletic co Ltd* [1935] Ch 718 at 727;
- B** *Whiffen v. Hartwright* (1848) 11 Beav 111; *Turney v. Bayley* (1864) 4 De GJ & Sm 332.) Such an agreement may be implied; for example, correspondence during negotiations marked ‘without prejudice’ between the parties will not be ordered to be produced for inspection. ‘Without prejudice’ statements are only protected from production where they are made in the course of *bona fide* negotiations for the
- C** settlement of a dispute. (see *Re Daintrey* [1893] 2 QB 116. Indeed, it is not strictly necessary so to mark documents, since the common law will grant such a privilege even without express marking: *Pirie v. Wyld* (1886) 11 OR 422 at 427; *Cameron Packaging Ltd v. Ruddy* (1983) 41 CPC 154 at 194. The heading will have no effect in the following
- D** cases: (1) where an agreement as to the settlement of the dispute has been reached (*Rush & Tomkins Ltd v. Greater London Council* [1989] AC 1280, [1988] 3 All ER 737, HL); ... The privilege attaching to statements made to persons acting as conciliators in matrimonial disputes is also based on an implied agreement that such statements are made “without prejudice” (see *Mole v. Mole* [1951] P 21 at 24,
- E** [1950] 2 All ER 328 at 329, CA (Eng), per Denning LJ).

In Malaysia the law on without prejudice communications is governed by legislation. Evidence Act 1950 (Act 56) s. 23. Thus the common law will apply only where it is not inconsistent with the relevant legislation. However, although the legislation states the principles, the detailed rules are to be gathered from the cases. See *A-B Chew Investments Pte Ltd v. Lim Tjoen Kong* [1989] 3 MLJ 328; *Malayan Banking Bhd v. Foo See Moi* [1981] 2 MLJ 17 (where the communications lead to a settlement, then the court will admit the communications in order to determine the terms of the settlement); *Wong Nget Thau v. Tay Choo Foo* [1994] 3 MLJ 723 (The fact that a document is headed ‘without prejudice’ does not conclusively or automatically render it privileged from admission in evidence); *Boss s/o Ramasamy v. Penang Port Sdn Bhd* [1996] 5 MLJ 511.

- [181]** In *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co* [1882] 11 QBD 55, CA (Eng) the English Court of Appeal
- H** held that the party wishing to have the document discovered must show that the document is *prima facie* relevant.

[182] Breft LJ said as follows at p. 38:

- I** A document is not “material,” unless it relates to the subject matter of the action, and the documents of which production is sought do not relate to the question in dispute.

[183] In my view the principle of law enunciated in the case cited above is also applicable to the facts in the instant case concerning the wish of the plaintiff to have the three letters produced in the full trial of his claim against the defendant. Based on the *ratio decidendi* of the case the three letters are *prima facie* irrelevant to the plaintiff's claim against the defendant for damages for defamation.

Conclusion

[184] Based on the reasons as set out above, I am of the respectful view that my decisions and directions were fair and were within my discretion to make in order to ensure a just, expeditious and economical disposal of the plaintiff's suit at the full trial pursuant to O. 34 rr. 2(2) and (3) of the RC 2012.

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